

ISMAIL J. RAMSEY (CABN 189820)  
United States Attorney  
MICHELLE LO (NYRN 4325163)  
Chief, Civil Division  
PAMELA T. JOHANN (CABN 145558)  
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055  
San Francisco, California 94102-3495  
Telephone: (415) 436-7025  
FAX: (415) 436-6748  
pamela.johann@usdoj.gov

ATTORNEYS FOR U.S. DEPARTMENT OF HEALTH  
AND HUMAN SERVICES

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

## **NOTICE OF MOTION AND MOTION TO DISMISS**

2 PLEASE TAKE NOTICE that on September 6, 2024, at 10:00 a.m., or as soon thereafter as the  
3 matter may be heard, in Courtroom A, 15th Floor, of the United States District Court for the Northern  
4 District of California, located at 450 Golden Gate Avenue, San Francisco, California, before the  
5 Honorable Alex G. Tse, Defendant United States Department of Health and Human Services will and  
6 hereby does move for an order dismissing the Complaint of Plaintiff James Pistorino for failure to state a  
7 claim pursuant to Federal Rule of Civil Procedure 12(b)(6). This motion is based on this Notice; the  
8 Memorandum of Points and Authorities and Request for Consideration of Documents Incorporated by  
9 Reference submitted herewith; the pleadings, records, and files in this case; other matters of which the Court  
10 takes judicial notice; and such other written or oral argument as may be presented at or before the time the  
11 Court takes this motion under submission.

## RELIEF REQUESTED

Defendant seeks an order dismissing the Complaint in its entirety.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

16 Plaintiff James Pistorino jumped the gun by filing this Freedom of Information Act (“FOIA”)  
17 lawsuit without having first exhausted his administrative remedies. On March 12, 2024, Plaintiff  
18 submitted a Freedom of Information Act (“FOIA”) request to the Centers for Medicare & Medicaid  
19 Services (“CMS”), a division within the U.S. Department of Health and Human Services (“HHS”).  
20 CMS responded to Plaintiff’s request, issuing a determination letter on May 16, 2024. Although  
21 Plaintiff was then required to exhaust his administrative remedies by submitting an administrative  
22 appeal to HHS before filing a lawsuit in federal court challenging the adequacy of the agency’s  
23 response, he bypassed that step, instead filing a complaint in this Court six days later. The FOIA  
24 exhaustion requirement is intended to allow agencies an opportunity to correct their mistakes and to  
25 promote judicial efficiency by avoiding unnecessary judicial intervention. Plaintiff’s immediate resort  
26 to judicial recourse undermines both the policy and purpose of administrative exhaustion. Because  
27 Plaintiff failed to exhaust his administrative remedies before filing this lawsuit, the Court should dismiss  
28 his complaint for failure to state a claim upon which relief can be granted.

1 **II. ISSUES TO BE DECIDED**

2 Whether the Complaint should be dismissed for failure to state a claim due to Plaintiff's failure  
 3 to exhaust administrative remedies, where the agency responded to Plaintiff's request and Plaintiff filed  
 4 a lawsuit in district court rather than submitting an administrative appeal.

5 **III. BACKGROUND**

6 On March 12, 2024, Plaintiff James Pistorino, an attorney licensed in California, submitted a  
 7 FOIA request on his own behalf to the Centers for Medicare and Medicaid Services ("CMS"). Dkt. No.  
 8 1 ("Compl.") ¶ 6 & Ex A. CMS acknowledged receipt of the request the next day. *Id.* ¶ 7. In response  
 9 to Plaintiff's status inquiry submitted on April 18, 2024, Kenyatta Stringfellow, a Government  
 10 Information Specialist with CMS's FOIA group, advised Plaintiff on April 19, 2024, that CMS was "still  
 11 processing" the request and that the status was "pending search for the requested documents." *Id.* ¶ 8;  
 12 Request for Consideration of Documents Incorporated by Reference ("Request") Ex. A. Ms.  
 13 Stringfellow informed Plaintiff that he should "feel free to contact" her if he had "any additional  
 14 questions regarding the status of this request." Request Ex. A.

15 CMS issued a response to Plaintiff's FOIA request on May 16, 2024. Compl. ¶ 9; Request Ex.  
 16 B. In this letter, Desiree Gaynor of CMS's FOIA Group informed Plaintiff that it was "unable to locate  
 17 any records responsive" to Plaintiff's request after "a careful search of" CMS files. Request Ex. B. The  
 18 letter also advised Plaintiff of his appeal rights, informing Plaintiff that he could appeal the decision  
 19 within 90 days if he considered it an adverse determination by mailing an appeal to the Principal Deputy  
 20 Administrator of CMS. The letter explained, "[b]y filing an appeal, you preserve your rights under  
 21 FOIA and give the agency a chance to review and reconsider your request and the agency's decision."  
 22 Plaintiff was also invited to contact Kenyatta Stringfellow or the CMS FOIA Public Liaison if he wished  
 23 "to discuss [CMS's] response before filing an appeal to attempt to resolve [the] dispute without going  
 24 through the appeals process." Finally, Plaintiff was advised that if he was unable to resolve the dispute  
 25 through the FOIA Public Liaison, he could take advantage of mediation services through the Office of  
 26 Government Information Services, part of the National Archives and Records Administration. Request  
 27 Ex. B.

28 There is no allegation in the Complaint that Plaintiff submitted an administrative appeal. *See*

1 Compl. ¶¶ 9–11. Instead, on May 22, 2024, six days after CMS’s response, Plaintiff filed this lawsuit.

2 **IV. LEGAL STANDARD**

3 A motion under Federal Rule of Civil Procedure 12(b)(6) challenge disputes “the legal  
 4 sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under Rule  
 5 12(b)(6) is proper where there is either a “lack of a cognizable legal theory” or “the absence of sufficient  
 6 facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699  
 7 (9th Cir. 1990). A pleading must “contain either direct or inferential allegations respecting all the  
 8 material elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v.*  
 9 *Twombly*, 550 U.S. 544, 562 (2007). To survive a motion to dismiss, a complaint must “state a claim to  
 10 relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. A claim has “facial plausibility” only if  
 11 the complaint pleads facts sufficient to allow “the court to draw the reasonable inference that the  
 12 defendant is liable for misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the  
 13 Court must treat all factual allegations as true for purposes of a motion to dismiss, the Court is “not  
 14 bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. 678. An  
 15 affirmative defense that is apparent on the face of the complaint may be grounds for dismissal under  
 16 Rule 12(b)(6). *Fargo v. Dep’t of Homeland Sec.*, No. 16-cv-00024, 2019 WL 10491057, at \*2 (D. N.  
 17 Mar. I. Feb. 19, 2019), *aff’d sub. nom Kourbanov v. U.S. Dep’t of Homeland Security*, 804 F. App’x 797  
 18 (9th Cir. 2020).

19 In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court  
 20 “generally may not take into account material beyond the complaint.” *Dunn v. Castro*, 621 F.3d 1196,  
 21 1205 n.6 (9th Cir. 2010) (citing *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052  
 22 (9th Cir. 2007)). However, a court may also consider matters that are judicially noticeable, as well  
 23 “materials incorporated into the complaint” under the doctrine of “incorporation by reference.” *Dunn*,  
 24 621 F.3d at 1205 n.6. The incorporation-by-reference doctrine allows a court to “consider ‘documents  
 25 whose contents are alleged in a complaint and whose authenticity no party questions, but which are not  
 26 physically attached to the [plaintiff’s] pleading.’” *Dunn*, 621 F.3d at 1205 n.6 (quoting *Knivele v.*  
 27 *ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (alteration in *Knivele*)).

28

1       **V. ARGUMENT**2       **A. A FOIA Requester Must Exhaust Administrative Remedies Before Bringing A**  
3       **Lawsuit In Federal Court.**

4       Plaintiff's Complaint must be dismissed because Plaintiff has not exhausted his administrative  
5       remedies. "Exhaustion of a parties' administrative remedies is required under the FOIA before that  
6       party can seek judicial review." *In re Steele*, 799 F.2d 461, 465 (9th Cir. 1986) (citations omitted);  
7       *Aguirre v. NRC*, 11 F.4th 719, 725 (9th Cir. 2021). The administrative exhaustion doctrine "serves the  
8       twin purposes of protecting administrative agency authority and promoting judicial efficiency."  
9       *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Administrative exhaustion under FOIA requires a  
10      requester to comply with "published administrative procedures" as set forth in agency regulations. *In re*  
11      *Steele*, 799 F.2d at 466; *Am. Small Bus. League v. United States Dep't of Navy*, No. 10-cv-02150 JSW,  
12      2011 WL 13308325, at \*2 (N.D. Cal. Feb. 7, 2011) (finding failure to exhaust where requester submitted  
13      administrative appeal to address not designated by the agency to receive FOIA appeals).

14       As part of these administrative exhaustion requirements, a FOIA requester must administratively  
15      appeal an adverse FOIA determination before turning to the courts for judicial relief. *Aguirre*, 11 F.4th  
16      at 725. HHS's FOIA regulations explicitly spell out this requirement. *See* 45 C.F.R. § 5.61 ("In order to  
17      fully exhaust all of your administrative remedies, you must file an appeal of an adverse agency  
18      determination in writing."). This administrative appeal requirement is designed to give agencies an  
19      opportunity to correct errors that may have occurred by the first-line FOIA responders, potentially  
20      avoiding the need for judicial review, and to create "a useful record 'should judicial review become  
21      necessary.'" *Aguirre*, 11 F.4th at 725 (quoting *Amerco v. NLRB*, 458 F.3d 883, 888 (9th Cir. 2006)); *see also*  
22      *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) ("Exhaustion of administrative  
23      remedies is generally required before filing suit in federal court so that the agency has an opportunity to  
24      exercise its discretion and expertise on the matter and to make a factual record to support its decision.");  
25      *Taylor v. Appleton*, 30 F.3d 1365, 1369 (11th Cir. 1994) ("Allowing a FOIA requester to proceed  
26      immediately to court to challenge an agency's initial response would cut off the agency's power to  
27      correct or rethink initial misjudgments or errors."). A FOIA complaint that fails to allege compliance  
28      with administrative exhaustion requirements is subject to dismissal under Rule 12(b)(6) for failure to

1 state a claim upon which relief can be granted. *Freedom Watch, Inc. v. C.I.A.*, 895 F. Supp. 2d 221, 226  
 2 (D.D.C. 2012); *Fargo*, 2019 WL 10491057, at \*2 (FOIA complaint dismissed where plaintiff “did not  
 3 plead facts showing an [administrative] appeal”).

4 **B. Plaintiff’s Complaint Must Be Dismissed For Failure To Exhaust Administrative  
 5 Remedies Because He Did Not Submit An Administrative Appeal Of The Adverse  
 6 Determination.**

7 Upon receiving the agency’s May 16, 2024 determination letter dated stating that CMS was  
 8 “unable to locate any [responsive] records,” Plaintiff was required to file an administrative appeal to  
 9 exhaust his administrative remedies. *See* 45 C.F.R. § 5.61(b) (a “[d]etermination that a record does not  
 10 exist or cannot be found” is an adverse agency determination that must be appealed administratively).  
 11 Plaintiff fails to allege compliance with the administrative appeal requirement. Instead, he filed his  
 12 Complaint in federal court six days after receiving CMS’s adverse determination. Had Plaintiff filed an  
 13 administrative appeal after receiving the adverse determination, HHS would have had twenty working  
 14 days to respond to it. *See* 45 C.F.R. § 5.63; 5 U.S.C. § 552(a)(6)(A)(ii). The Complaint was filed before  
 15 this twenty-day period would have expired. Although a requester may seek judicial review without  
 16 submitting an administrative appeal if the agency does not provide a response to the request within the  
 17 applicable FOIA time provisions, this right to immediate judicial review lapses where, as here, the  
 18 agency responds to the FOIA request before the lawsuit is filed. In this situation, the requester must  
 19 administratively appeal the denial and wait at least twenty working days for the agency to adjudicate that  
 20 appeal before commencing litigation. *See Aguirre*, 11 F.4th at 725–26 (“[A] requestor in essence waives  
 21 his right to immediately sue by waiting to do so until after receiving a response from the agency. At that  
 22 point, he must exhaust.”). Because Plaintiff chose to forego the administrative appeal process  
 23 altogether, he failed to exhaust his administrative remedies, and his Complaint should be dismissed.

24 While “[e]xhaustion under FOIA is a prudential rather than jurisdictional consideration” and may  
 25 be excused where further administrative processing would be “futile,” *Aguirre*, 11 F.4th at 725, there  
 26 can be no inference of futility here, where “[a]n appeal would have afforded [the] agency an opportunity  
 27 to review its search and its response” and, if appropriate, order a new search that might have uncovered  
 28 responsive documents. *Melville v. U.S. Dep’t of Just.*, No. 05-cv-0645, 2006 WL 2927575, at \*3  
 (D.D.C. Oct. 12, 2006). The HHS appeal review process is multi-layered and involves the input and

1 concurrence of higher-level officials at the agency; by regulation, “[b]efore making a decision on an  
 2 appeal of an adverse determination, the designated review official will consult with the Office of the  
 3 General Counsel,” and “the concurrence of the Office of the Assistant Secretary for Public Affairs is  
 4 required in all appeal decisions.” 45 C.F.R. § 5.63. To the extent Plaintiff believes that CMS’s  
 5 determination was erroneous, an administrative appeal is precisely the mechanism to bring that error to  
 6 the attention of the agency so that mistakes made at the lower level of FOIA processing can be reviewed  
 7 and corrected if appropriate without the need for judicial intervention. By failing to submit an appeal,  
 8 Plaintiff “‘cut[] off the agency’s power to correct or rethink initial misjudgments or errors.’” *Aguirre*, 11  
 9 F.4th at 725 (quoting *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 64 (D.C. Cir. 1990)). Plaintiff’s  
 10 rush to the courthouse therefore defeated “the purposes and policies of FOIA exhaustion—i.e. to give  
 11 the [agency] a chance to exercise its discretion and to review its decisionmaking process before judicial  
 12 intervention.” *Facebook, Inc. & Subsidiaries v. Internal Revenue Serv.*, No. 16-cv-05884-LB, 2017 WL  
 13 2630086, at \*7 (N.D. Cal. June 19, 2017); *see also Corbett v. U.S. Transportation Sec. Admin.*, No. 22-  
 14 cv-6920, 2023 WL 5667535, at \*4 (C.D. Cal. July 14, 2023) (“[w]hile merely a jurisprudential doctrine,  
 15 the underlying policy of exhaustion—to provide the agency an opportunity to review its own  
 16 decisionmaking process before judicial intervention—must still carry the day” (quoting *Andrus v.*  
 17 *United States Dep’t of Energy*, 200 F. Supp. 3d 1093, 1102 (D. Idaho 2016)).

18 **VI. CONCLUSION**

19 For the foregoing reasons, the Court should grant HHS’s motion to dismiss Plaintiff’s complaint  
 20 for failure to exhaust his administrative remedies.

21 DATED: July 29, 2024

Respectfully submitted,

22 ISMAIL J. RAMSEY  
 23 United States Attorney

24 

---

 /s/ *Pamela T. Johann*  
 25 PAMELA T. JOHANN  
 26 Assistant United States Attorney

27 Attorneys for Defendant